

Einführung in das chinesische Rechtssystem



Streitsbeilegung System

*** I. Gerichtsverfahren**

*** II. Schiedsverfahren**

**III. Vergleich zwischen dem
Gerichtsverfahren und Schiedsverfahren**

IV. Mediationverfahren

*** V. Petitionsverfahren**

*** VI. Question?**

I. Gerichtsverfahren

- * Important legal resource
- * The Civil Procedure Law of the People's Republic of China (2017 Revision)

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- * civil actions regarding property or personal relationships between citizens, between legal persons, between other organizations or between citizens and legal persons, citizens and other organizations or legal persons and other organizations should be accepted by a people's court (Article 3)

same procedural rights and obligations for Chinese and foreign

- * Foreign nationals, stateless persons and foreign enterprises and organizations which institute or respond to actions in the people's courts shall have equal procedural rights and obligations as citizens, legal persons and other organizations of the People's Republic of China(**Article 5**).

Precondition for institution of a litigation at the court

- * (1) The plaintiff is a citizen, legal person or any other organization with a direct interest in the case.
- * 2) There is a clear defendant.
- * (3) There are specific claims, facts and reasons;
- * (4) The case is within the scope of civil actions accepted by the people's courts and under the jurisdiction of the people's court in which the action is instituted

Hierarchical Jurisdiction

- * The basic people's courts
- * The intermediate people's courts
- * The higher people's courts
- * The Supreme People's Court

Relation between these courts

- * The basic people's courts shall **have jurisdiction over civil cases as a court of first instance**, except as otherwise provided for in this Law.(Article 17)

intermediate people's courts

- * The intermediate people's courts shall have jurisdiction over the following civil cases as a court of first instance:
 - * (1) Major foreign-related cases
 - * (2) Cases which have a major impact within their respective jurisdictions.
 - * (3) Cases which are under the jurisdiction of the intermediate people's courts as determined by the Supreme People's Court(Article 18)

The higher people's courts

- * The higher people's courts shall have jurisdiction over civil cases which **have a major impact within their respective jurisdictions as a court of first instance(Article 19)**

The Supreme People's Court

- * **The Supreme People's Court** shall have jurisdiction over the following civil cases as a court of first instance:
 - * (1) Cases which have a major impact nationwide.
 - * (2) Cases which the Supreme People's Court deems shall be tried by itself (Article 20)

Which court has the jurisdiction?

- * A civil action instituted against a citizen shall be under the jurisdiction of the people's court at the place of domicile of the defendant; or if the defendant's place of domicile is different from his or her place of habitual residence, the civil action shall be under the jurisdiction of the people's court at the place of habitual residence of the defendant (Article 21).

- * A civil action instituted against a legal person or any other organization shall be under the jurisdiction of the people's court at the place of domicile of the defendant.
- * Where the places of domicile or places of habitual residence of several defendants in the same action are located within the jurisdictions of two or more people's courts, both or all of such people's courts shall have jurisdiction over the action

Exemption(Article 22)

- * The following civil actions shall be under the jurisdiction of the people's court at the place of domicile of the plaintiff; or if the plaintiff's place of domicile is different from his or her place of habitual residence, the civil actions shall be under the jurisdiction of the people's court at the place of habitual residence of the plaintiff:

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- * (1) An action regarding a personal relationship instituted against a person who does not reside within the territory of the People's Republic of China.
 - * (2) An action regarding a personal relationship instituted against a person whose whereabouts is unknown or against a person who has been declared missing

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- * (3) An action instituted against a person who is subject to any compulsory correctional measure.
 - * (4) An action instituted against a person who is incarcerated.

Specific cases

- * **Art. 23-35**
- * An action instituted for a contract dispute shall be **under the jurisdiction of the people's court at the place of domicile of the defendant or at the place where the contract is performed(Article 23)**.

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- * An action instituted for an **insurance contract dispute** shall be under the jurisdiction of the people's court **at the place of domicile of the defendant or at the place where the subject matter insured is located**(**Article 24**).

Period of a civil procedure(Article 149)

- * Usual case

- * A people's court shall complete the trial of a case under formal procedure within six months after the case is docketed. If an extension of the period is necessary under special circumstances, the period may be extended for six months with the approval of the president of the people's court; and any further extension shall be subject to the approval of the superior of the people's court.

obligation of investigation

- * Judges must carefully examine case materials and **investigate and collect necessary evidence**(Article 129).
- * Article 130 The **personnel assigned by a people's court to conduct investigation** shall produce their credentials to the person under investigation.

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- * Article 131 The entrusted people's court shall complete investigation within 30 days after receiving a letter on entrusted investigation.

Exeption of the normal procedure

- * Summary Procedure(建议程序):
- * Article 161 A people's court which tries a case under summary procedure shall complete the trial of the case within three months after the case is docketed.

Decision of the courts

- * Judgments and RulingsJudgments and Rulings



A written judgment (Article 152)

- * A written judgment shall state the results of judgment and reasons for entering the judgment. The content of a written judgment includes:
 - * (1) the cause of action, claims, facts in dispute, and reasons;
 - * (2) the facts found and reasons and the laws applied and reasons in the judgment;
 - * (3) the results of judgment and the assumption of litigation expenses;

Rulings Article (154)

- * Decision of court relates to following subjects:
 - * (1) Refusing to accept an action(不予受理);
 - * (2) Objection to jurisdiction(对管辖权有异议的);
 - * (3) Dismissing an action(驳回起诉);
 - * (4) Preservation and advance enforcement;
 - * 6) Suspension or termination of an action;
- * And so on

appeal

- * The people's court of second instance shall review the facts and application of law in relation to the claims in appeal(Article 168).

Period of appeal(Article 176)

- * A people's court shall complete the trial of an appeal case against a judgment (判決) within three months after the appeal is docketed. Any extension of the aforesaid period under special circumstances shall be subject to the approval of the president of the people's court.

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- * A people's court shall issue a final ruling for an appeal case against a ruling(裁定) within 30 days after the appeal is docketed

II. Arbitration

- * Resource of law
- * Arbitration Law of the People's Republic of China (2017 Amendment)
- * the Supreme Court's interpretations in relation to it.



the Civil Procedure Law (such as those on jurisdiction, procedures, and recognition and enforcement of arbitral awards).

the New York Convention, its rules apply to the recognition and enforcement of foreign arbitral awards in China.

1. Scope of application

- * Contractual disputes and other disputes over rights and interests in property between citizens, legal persons and other organizations that are equal subjects may be arbitrated(Article 2).

Scope of application(Article 3)

- * The following disputes may not be arbitrated:
- * (1) marital, adoption, guardianship, support 扶养 and succession disputes;
- * (2) administrative disputes that shall be handled by administrative organs as prescribed by law.

2. Precondition for arbitration

- * The parties' submission to arbitration to resolve their dispute shall be on the basis of both **parties' free will** and **an arbitration agreement reached between them**. If a party applies for arbitration in the absence of an arbitration agreement, the arbitration commission shall not accept the case(Article 4).

3 The effective of arbitration agreement

- * If the parties have concluded an arbitration agreement and one party institutes an action in a people's court, the people's court shall not accept the case, unless the arbitration agreement is null and void(Article 5).

4. jurisdiction of The arbitration commission

- * The arbitration commission shall be selected by the parties through agreement. In arbitration, there shall be **no jurisdiction by level and no territorial jurisdiction**(Article 6).

5. A system of a single and final award

- * A system of a single and final award shall be practised for arbitration. If a party applies for arbitration to an arbitration commission or institutes an action in a people's court regarding the same dispute after an arbitration award has been made, the arbitration commission or the people's court shall not accept the case(Article 9).

6. An arbitration commission

- * Article 11 An arbitration commission shall meet the conditions set forth below:

(1) To have its own name, domicile and charter;

(2) To have the necessary property;

(3) To have the personnel that are to form the commission; and

(4) To have appointed arbitrators.

7. Arbitrators(Article 13)

- * An arbitration commission shall appoint its arbitrators from among righteous and upright persons.
- * An arbitrator shall meet one of the conditions set forth below:
- * (1) He or she has passed the national uniform legal profession qualification examination and obtained the legal profession qualification, and conducted the arbitration work for eight years or more;

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- * (2) To have worked as a lawyer for at least eight years;
 - * (3) He or she has served as a judge for eight years or more;
 - * (4) To have been engaged in legal research or legal education, possessing a senior professional title; 0

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- * 5) To have acquired the knowledge of law, engaged in the professional work in the field of economy and trade, etc., possessing a senior professional title or having an equivalent professional level.

8. Independent of Arbitration commissions

- * Arbitration commissions shall be independent from administrative organs and there shall be no subordinate relationships between arbitration commissions and administrative organs. There shall also be no subordinate relationships between arbitration commissions (Article 14).

Arbitration organisations

- * China International Economic and Trade Arbitration Commission (CIETAC).
- * Shanghai International Economic and Trade Arbitration Commission/Shanghai (International Arbitration Center (SHIAC)).
- * South China International Economic and Trade Arbitration Commission/Shenzhen Court of International Arbitration (SCIA).

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- * Beijing Arbitration Commission/Beijing International Arbitration Center (BIAC).
 - * China Maritime Arbitration Commission (CMAC).
 - * Wuhan Arbitration Commission.
 - * Shanghai Arbitration Commission (SHAC).
 - * Guangzhou Arbitration Commission.

9. Period

- * Usually 4 month



III. Compared with litigation,

- * 1. Differences between them



A) The bases for jurisdiction are different

- * The jurisdiction in arbitration agency is optional, which is based on the agreement between both parties.
- * However, the jurisdiction of court is fitted by law, so both parties can only stipulate jurisdiction within the scope determined by the Civil Procedure Law of the People's Republic of China.

B) The trail grade systems are different

- * Arbitral awards in various countries commonly apply the system that the first instance is final,, and both parties can not sue to the court or request other organs to change the award.
- * However, litigation in court usually needs more than second instance, so using litigation to settle dispute will take a long period\

C) The organizations are different

- * Arbitration institutions are generally folk organizations, and arbitrators are not appointed by the state, but listed by the standing body usually. The arbitrators are appointed by both parties, thus, the arbitration proceeding is more flexible for both parties.
- * However court is the judicial organ of the state, judges of courts are selected or appointed by the state, both parties having no freedom to choose the judge.

D) The procedures are different

- * The parties could request for renewing the arbitration proceeding since new arbitrators are appointed or selected due to obviation(回避), and the arbitrators decide whether to approve or not. The arbitration tribunal may also decide exclusively whether the arbitration procedure would be renewed.

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- * In the process of the proceedings, if you decide to evade, the litigation procedure will continue after the personnel is changed.

E) not disclosure to the public

- * Arbitration will not be disclosed to the public unless it is engaged through agreement. In addition, the peace settlement both parties reach can be written into the arbitration award.
- * While litigation is based on the principle of public trial and trial in camera is exception. The court must ascertain the facts and then make the judgment

F) The differences between foreign arbitral awards and the court in acknowledgement and execution

- * The domestic executions of the arbitration award or court judgment in a country make no difference. Both of them can be enforced, and if one party does not execute the arbitration or court judgment, the other party may apply to the court for compulsory execution.

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- * However, if the arbitral award or court judgment needs to get another country's recognition and enforcement, must base on the treaty between the two countries or the prerequisite of mutually beneficial relationship.

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- * Currently, the most important international treaty which admits and execute foreign arbitral award is Convention of the Recognition and Enforcement of Foreign Arbitration Awards, which took effect on June 7th, 1959. More than 70countries and reigns accessed, and china accessed to this convention in December of 1986.

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- * But multilateral conventions which admit and enforce foreign judgments are seldom, and the applicable scope of these conventions is narrow. Moreover, these conventions with considerable length regulate the conditions can refuse recognition and enforcement of foreign judgments.

2. Advantages of arbitration

- * **Advantages** arbitration has the following advantages:
- * 2.1. Arbitration is usually considered to be **neutral** and can alleviate the parties' concerns about the impartiality of local Chinese courts.

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- * 2.2. The parties **have a great deal of flexibility to choose the procedures** they wish to follow and there are very few limits on these choices as long as there is a consensus. In contrast, litigation procedures are much more rigid.

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- * **2. 3. Arbitration is confidential** but litigation is open to the public (unless it involves state secrets, personal privacy or other circumstances that warrant the confidentiality of court proceedings).

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- * 2.4. Enforcing a foreign arbitral award through the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) is much easier than enforcing a foreign court judgment.

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- * **Enforcing a Chinese award** in other countries is easier than enforcing a Chinese court judgment.

3. disadvantages

- * arbitration also has the following limits:
- * 3.1, The arbitration agreement usually only binds the parties who sign it. A non-signing party cannot be compelled into the arbitration and sometimes disputes cannot be resolved in a single arbitration. This seriously hampers the efficiency of dispute resolution.
- * In contrast to court judgments, arbitral awards cannot be appealed.

IV. Mediation



1. Legal background

- * **The Civil Procedure Law of the People's Republic of China (2017 Revision)**
- * *Provisions on Several Issues Concerning Civil Mediation Work of People's Courts issued by PRC Supreme People's Court, in 2004*
- * **Guidance on Carrying out Quality Assessments of Cases (Trial) " issued in 2008**

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- * *“Indicators of the Quality of Trial in Courts issued by Shanghai Higher People’s Court 2005” (《法院审判质量效率指标》)*
 - * *Implementation Opinions concerning Establishing a Universal Indicators System and Evaluation System on the Quality of Trial within the Whole Province (trial) issued by Jiangsu Higher people’s Court 2003”*

Some important concepts

- * Mediation is a basic way to settle civil and commercial disputes between different parties. Compared to litigation, a striking characteristic of mediation is that it is the **free choice of the parties to a dispute**, that is, the parties not only enter into an agreement on their free will, but also generally perform the obligations under the agreement voluntarily.

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- * When trying civil cases, the people's courts shall **conduct mediation under the principles of free will of the parties and legality**; and if mediation fails, shall enter a judgment in a timely manner(**Article 9**).

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- * The parties shall be entitled to retain representatives, file a request for disqualification, collect and provide evidence, debate, file a request for mediation, file an appeal, and apply for enforcement(Article 49).

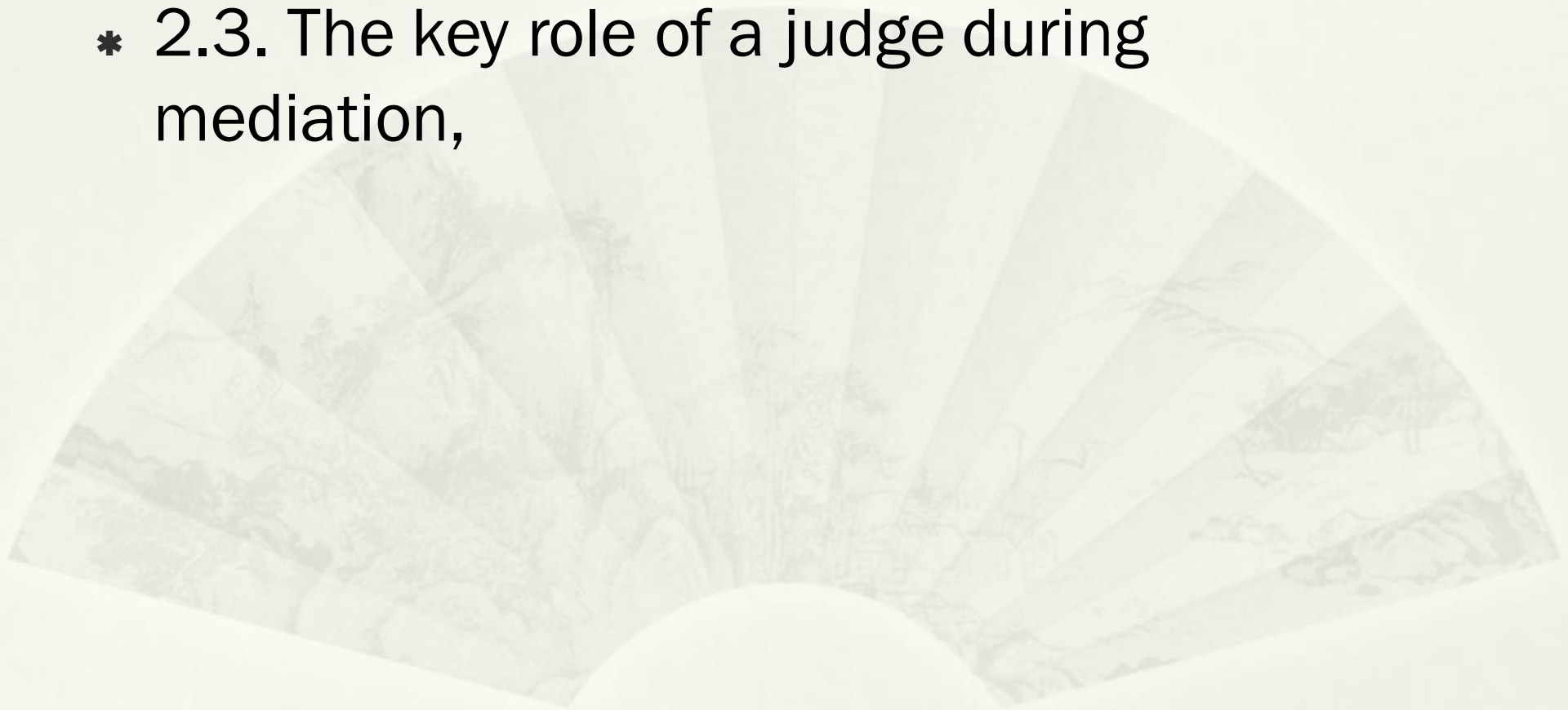
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- * Article 93 When trying civil cases, a people's court shall, under the principle of free will of the parties, conduct mediation by distinguishing between right and wrong based on clear facts.

2. Features of mediation procedure

- * 2.1. Wide scope of application

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- * 2.2. Combination litigation and mediation, with mediation as the preferred solution

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- * 2.3. The key role of a judge during mediation,



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- * 2.4. The application of mediation in every stage of a civil litigation Procedure

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- * 2.5. Reach of Settlement Agreement on the basis of the facts.

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- * 2.6. The convenience for the parties of a dispute.



3. The encouraging measures adopted by Chinese courts

- * 3.1. Measures taken by the middle and higher courts;
- * 3.2. Measures taken by the primary courts:

3.1. Measures taken by the middle and higher courts:

- * to set the mediation rate as one evaluation index and make a ranking list accordingly.
- * the higher the “mediation rate” of a court is, the better the ranking of the court and the higher the quality of trial will be. Conversely, the lower the rate is, the lower the ranking of the court and the quality of its trial will be.

3.2. Measures taken by the primary courts:

- * 1) to set its targets for the court every month.
- * 2) to make a ranking list every month for each tribunal within the court.

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- * 3) to allocate the monthly mediation target to every tribunal or each judge.
 - * 4) to link the accomplishment of mediation targets to the rewards.
 - * 5) to link no accomplishment with soft sanction

3.3. Other measures taken by courts

- * Apart from this, some courts have also taken measures to encourage the parties to resolve their disputes through mediation. For instance, the litigation fee will be fully or partially refunded if the parties agree to settle the case through mediation.

V. Petitionsverfahren



1. what is petition and petition system?



“petition”?

- * **petition** means that citizens, legal persons could give information, make comments or suggestions or lodge complaints to the relevant departments of Chinese governments at all levels through letters, E-mails, faxes, phone calls, visits, and so on, which are to be dealt with by the relevant administrative departments according to law.

“petition system”?

- * The petition system includes the regulations, such as *“Regulations on Letters and Visits”* and the *“Opinions regarding Letters and Visits”*, and the concrete measures adopted by the governments at all levels in the petition practice, i.e. *“ranking-list of petition disposition”* and *“Responsibility system of chief officials”* and the related government departments in charge of petition.

the petition system?

- * According to such regulations the governments at all levels should set up **a special department** with special working staff to deal with the letters, visits and calls from the people.
- * **Each complaints or requirements** of the petitioner should be dealt with accordingly and properly.

functions of petition system

- * **informationsquerre:** get information about the problems of the underclass in the society;
- * **suggestions :** give their suggestions on urban planning, environment protection and legislation and so on;
- * **supervise:** the government and its officials.
- * **settle the disputes:**

settle the disputes:

- * A petitioner insisted his company by the punishment of local government, and goes to government of province or central government, and ask for compensation for 500000 yuan. The province or central government said to the local government, that this petitioner should get 300000 Yuan.

2. Reasons to talk on this topic

- * Highly discussed topic.
- * strange phenomenon:
- * On the one hand petition is a legal right granted by the law, and many Chinese citizen like to make use of the petition.

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- * On the other hand the Chinese government doesn't like the petition very much,
 - * it has put a lot of obstacles in order to make people very difficult to make use of the petition system.

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- * For example,
 - * the local governments send officials to Beijing and the provincial capital cities to prevent petitioners from appealing at the higher government, bring them back and then put them under compulsory punishment measures such as imprisonment and detainment;

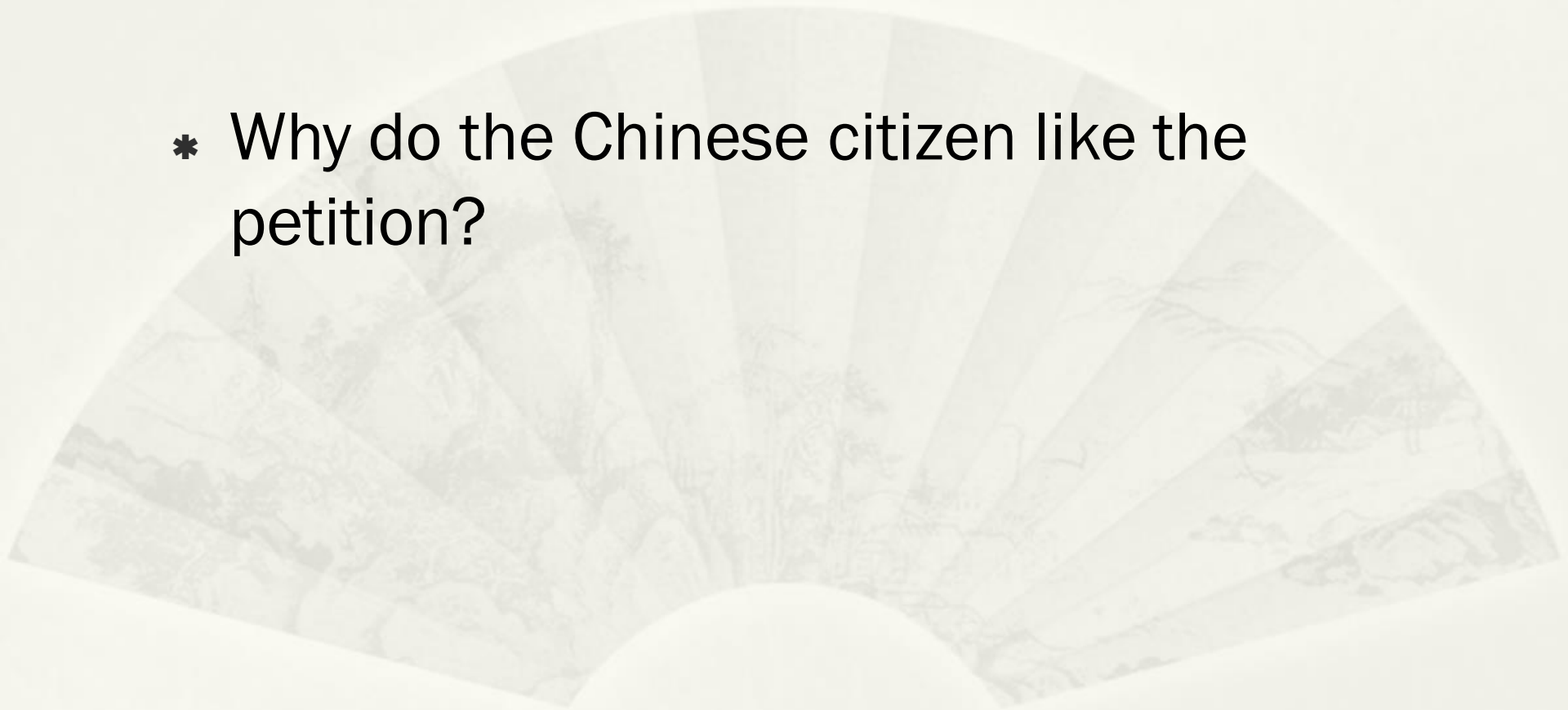
III. Reasons for raising petition

- * legal requirements with enough legal background.
- * Umsiedlung
- * Frueherzeitige Beendigung eines Mietvertrags
- * At the time of turning state enterprises into a limited liability companies, the enterprise has pay enough compensations to the people who became jobless during the procedure.

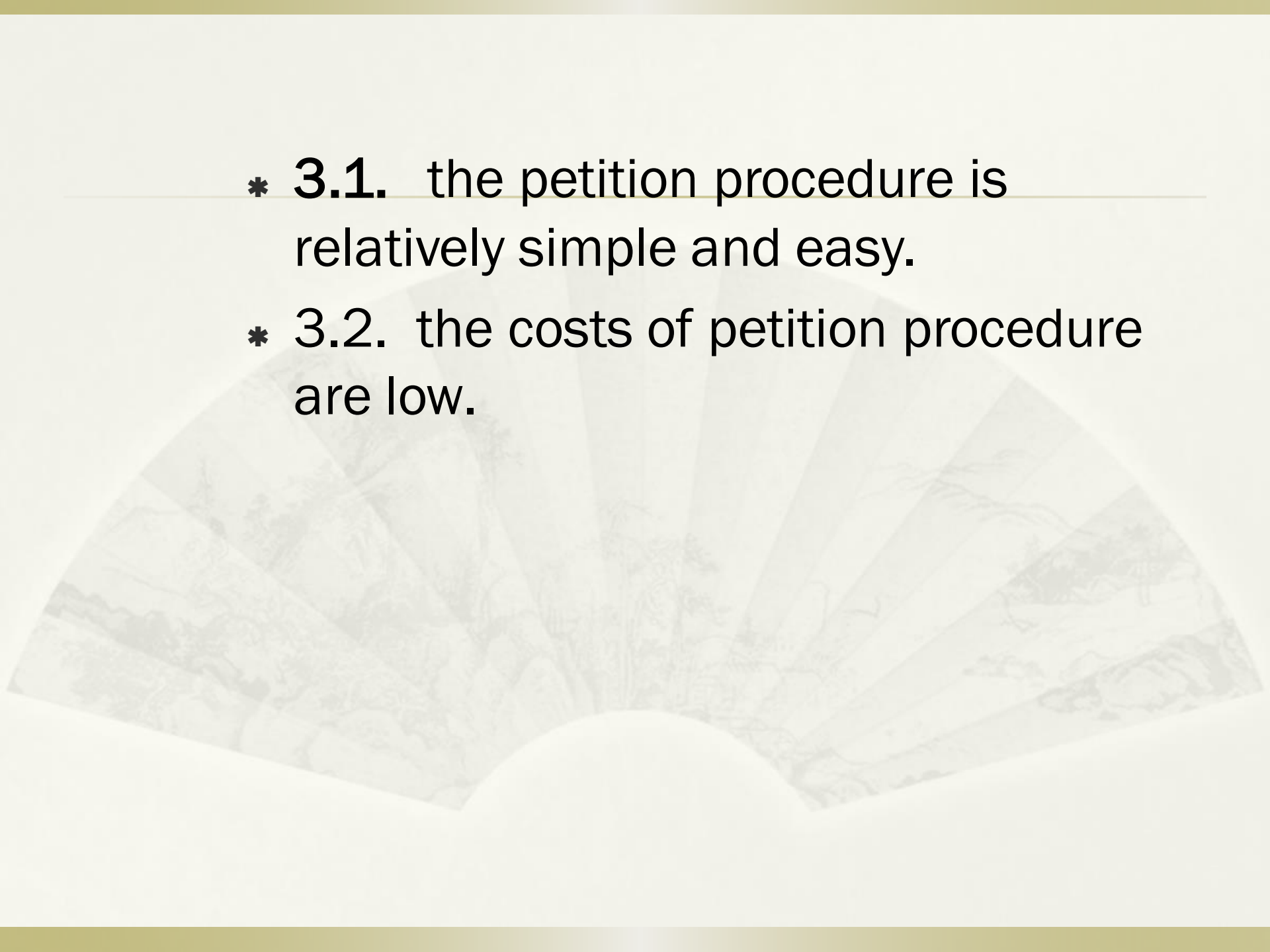
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- * Unreasonable requirement without any legal background
 - * Not satisfying with the effective judgement
 - * Not satisfying with the decision made by the government department
 - * Not satisfying with the decision made by other insitutions

3. Reason for the existence of such strange phenomenon

- * Why do the Chinese citizen like the petition?



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- * One of the function of the petition is **solve the dispute of petitioner,**
 - * Compared with traditional judicial procedure, petition has many advantages:

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- * **3.1.** the petition procedure is relatively simple and easy.
 - * **3.2.** the costs of petition procedure are low.

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- * 3.3. the petition system may **work more efficiently than** the judicial procedure.
 - * 3.4. the result of petition procedure may be more **beneficial than** the expectation of the petitioners, are therefore more acceptable to the petitioners.

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- * 3.5. there exist serious corruptions in Chinese judicial practice. Sometimes it could be very difficult for initiating a court procedure and enforcement procedure without using personal relationship.

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- * 3.6. there is a long tradition of petition in China: “high ranking officials in central government should be honest and upright and just”. Most petitioners prefer to go to Beijing, if they feel their rights are infringed by the local government.

reality

- * 上梁不正下梁歪
- * .Fish begins to stink at the head.
- * .If a leader sets a bad example, it will be followed by his subordinates.

4. Why Chinese government do not like petition?

- * why have the governments or officials in China tried to restrict or even forbid citizens to raise petition, **especially overstepping** petition?
- * the following reasons play an important role

4.1. Competent of the petition department is limited.

- * petition department do not have real competent to solve the problems of petitioners
- * this most important function is to forward the petitions to other authorities,
- * It can make suggestion, how the problem should dealt with, but its opinion does not have any binding effect on the government department in charge.

Result of this fact

- * the petitioners believe petitions departments are working unseriously. So it is not surprising that the petitioners hold petition authorities as their opponents.

4.2. Rule of allocation is questionable

- * petition cases shall be handled by the government of the place of occurrence or the government of the residence place of the petitioner.; The government of the residence place of the petitioner shall be responsible for handling petitions in case that both places differ from each other.

The first case

- * the place of occurrence and the place of the residence: same
- * only one government, this local government is responsible to solve the problem of the petitioner.

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- * But usually it is the administrative act of the local government which caused the petition, it is one party of the dispute, but he will play the role as the judicator;
 - * The government will play the roles both as athlete and referee at the same time, how it is possible?!

The second case

- * the place of occurrence differs from the place of the residence of the petitioners, the government of the residence place of the petitioner shall be responsible for the petition.

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- * The administrative act happened in other place as the local government in charge of the petition, he has no administrative power over it,
 - * because the petition is initiated by the administrative act of other government department in other district.

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- * this government in charge is not entitled either to review the decision of other government department, or ask it for making apology to the petitioner, how can it prevent the petitioner from raising the petition?

5. petition rankinglist and responsibility system



5.1. “*ranking-list*”

- * the governments at all levels in China have published a “*ranking-list of petition disposition*”, and adopt it as a major criterion to evaluate the works of the subordinate governments as well as their officials. If a responsible government falls behind others in the ranking-list, it means a poor performance of the government.

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- * the number of petitions, especially in overstepping petition, is one of the criteria for examination. The more overstepping petitions are raised, the poorer the performance of the local officials,

5.2. responsibility system

- * This responsibility system is strictly implemented in some places: So long as there is **any overstepping petition, all related persons-in-charge shall be punished.**

5.3. The legitimacy of this rankinglist and responsibility system

- * Not legal, because Chinese citizens enjoy the right of petition

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- * The rankinglist and responsibility systems only tried to reduce the occurrence of petition and overstepping petition,
 - * it has not expressly prescribed how its purpose is to be realized. In the end black prison, and so on



Question?

- * The more ways to settle disputes, the better?
- * Thank a lot for your attention!